

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

WILLIAM J. SIFUENTES
Claimant

V.

UNITED PARCEL SERVICE, INC.
Respondent

AND

LIBERTY MUTUAL FIRE INS. CO.
Insurance Carrier

Docket No. 1,011,310

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 23, 2014, Review & Modification Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on February 17, 2015. Lisa R. McWilliams of Kansas City, Missouri, appeared for claimant. Stephanie Warmund of Overland Park, Kansas, appeared for respondent.

The parties agree claimant has increased functional impairment to both legs following bilateral knee replacements. The ALJ found claimant's functional impairment to be 43.5 percent to the right leg and 43.5 percent to the left leg. The ALJ denied a credit for preexisting impairment related to a November 25, 1997, injury but awarded a credit for prior payments made in this case pursuant to the settlement in 2004. The ALJ noted any request for a retirement benefit credit did not apply due to the award of functional impairment, pursuant to K.S.A. 44-501.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues claimant's total impairment is 37 percent to each leg. Respondent maintains the uncontroverted evidence shows claimant's preexisting impairment is 16.25 percent to the right leg and 16 percent to the left leg based upon the settlement of the 1997 injury and prior award in this case. Respondent argues the ALJ

erred in not considering claimant's full preexisting impairment. Respondent requests the ALJ's Award be modified to reflect a 20.75 percent functional impairment to the right leg and a 21.5 percent functional impairment to the left leg.

Claimant argues no medical evidence was provided showing claimant had an impairment of the right leg preexisting May 5, 2003; therefore, respondent is not entitled to a credit. Further, claimant contends the evidence proves he is entitled to a 50 percent functional impairment of the right leg and a 50 percent functional impairment of the left leg.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?
2. Did the ALJ err in the application of the credit for claimant's preexisting impairment?

FINDINGS OF FACT

Claimant was employed by respondent for more than 40 years before his retirement on February 1, 2011. In 1997, claimant sustained a work-related injury to the right knee and settled the resulting claim for \$10,643.20 on a running award at a settlement hearing held on November 18, 1999. Claimant's settlement reflected a 15 percent permanent partial impairment to the right lower extremity. Claimant testified he experienced no problems or sought medical treatment for his right knee between 1999 and the accident of May 5, 2003.

On May 5, 2003, claimant sustained a work-related injury to both knees. Claimant underwent authorized treatment for both knees with board certified orthopedic surgeon Dr. Daniel Stechschulte, Jr. Claimant's right knee required less treatment than the left knee. Dr. Stechschulte eventually performed arthroscopic surgery on claimant's left knee on August 22, 2003. Claimant followed up with Dr. Stechschulte until his release in November 2003. Dr. James Stuckmeyer, a board certified orthopedic surgeon, examined claimant in January 2004 and provided a rating opinion at claimant's counsel's request.

Claimant settled his claim on April 5, 2004, on a running award for an amount representing a 16 percent permanent partial impairment to the left leg and a 1.25 percent permanent partial impairment to the right leg. Claimant received \$14,500 in a lump sum.

Claimant testified his bilateral knee pain initially improved after the 2003 arthroscopy before gradually worsening. He returned to Dr. Stechschulte in 2008 with severe bilateral knee pain. Dr. Stechschulte treated claimant conservatively with no success. Dr. Stechschulte eventually performed a total knee replacement of claimant's right knee on August 17, 2009, followed by a total knee replacement of the left knee on December 7, 2011. Claimant stated he had the same restrictions and recovery for both knee

replacements. Claimant testified his knees were immediately improved following the procedures, though he gradually worsened over time.

In a report dated February 20, 2010, Dr. Stechschulte determined claimant had a 37 percent permanent partial impairment to the right knee. Dr. Stechschulte testified he considered claimant's clinical and radiographic findings, occupational demands and subjective complaints in reaching his opinion. Dr. Stechschulte determined claimant had reached maximum medical improvement of the left knee on May 29, 2012. In a report dated May 31, 2012, Dr. Stechschulte opined claimant sustained a 37 percent permanent partial impairment to the left knee, again considering claimant's clinical findings, occupational demands and subjective complaints.

Dr. Stechschulte based his ratings on the diagnosis-based estimates of the AMA *Guides*.¹ Dr. Stechschulte felt claimant had a "good objective result"² and placed him in the "good" range of the diagnosis-based estimates, which provides an impairment percentage of 37 percent.³ Dr. Stechschulte testified he considered claimant's stability, motion, radiographic findings, alignment, and pain level when placing claimant in the "good" category. The AMA *Guides* indicate if claimant had occasional moderate pain, or mild occasional pain with walking and stairs, he would fall into the "fair" category, warranting an impairment percentage of 50 percent. Dr. Stechschulte agreed claimant reported pain in his bilateral knees throughout treatment and at the conclusion of physical therapy. Dr. Stechschulte testified his rating opinions remained unchanged.

In both Dr. Stechschulte's 2010 and 2012 reports, in reference to his rating opinion, he wrote: "It does not include any pre-existing disease or degenerative conditions."⁴ Dr. Stechschulte testified his ratings do include preexisting disease and degenerative conditions. Dr. Stechschulte explained:

Q. Why did you put that in your report official [sic] initially, that specific statement?

A. Because generally that's put in all ratings and it shouldn't be in there on any total knee rating or total shoulder rating because we remove all the degenerative condition when we replace a knee, there is no more degenerative condition, and there is no more degenerative condition when we replace a shoulder.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² Stechschulte Depo. at 16.

³ See American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) at 85, Table 64.

⁴ Stechschulte Depo., Exs. 2 & 3.

Q. Hence the rating doesn't include that?

A. The rating does include it because it doesn't exist anymore, it's removed from the joint in question.⁵

Claimant continued to follow up with Dr. Stechschulte before his release to full duty in 2014. Dr. Stechschulte testified claimant would require future medical treatment in the form of "ongoing clinical and radiographic follow-up and probably revision knee replacements."⁶

Dr. Stuckmeyer first examined claimant in 2004 when he provided a rating opinion related to claimant's bilateral knees. He again examined claimant on November 3, 2010, at claimant's counsel's request. Using the *AMA Guides*, Dr. Stuckmeyer concluded claimant sustained an overall 50 percent impairment to the right knee. Dr. Stuckmeyer testified that while it was known claimant underwent a prior surgery to the right knee in 1997, the operative records were not available for review. Dr. Stuckmeyer noted claimant related he was asymptomatic, doing well, and was not actively seeking ongoing treatment following his recovery from the 1997 procedure; therefore, Dr. Stuckmeyer opined claimant had no impairment to the right knee preexisting 2003.

Claimant returned to Dr. Stuckmeyer on February 6, 2013, again at his counsel's request. Dr. Stuckmeyer reviewed claimant's updated medical records, history, and performed a physical examination. He determined, using the *AMA Guides*, claimant has an overall 50 percent impairment to the left knee in addition to the previously rated 50 percent impairment of the right knee. Dr. Stuckmeyer based his ratings on claimant's subjective complaints, clinical findings and objective findings, in addition to his own clinical judgment and review of all available medical records. Dr. Stuckmeyer agreed with Dr. Stechschulte's recommendations regarding claimant's need for future medical treatment.

Dr. Stuckmeyer stated he also referred to the diagnosis-based estimates of the *AMA Guides* and found claimant to be in the "fair" category. Dr. Stuckmeyer testified:

If you look at the Guides and use the Guides in their entirety, which most people don't like to do, but they are to be used in their entirety – here, look at section 1.3 in combination with page 310 in combination with the rating that [was] discussed, it was my opinion that with all those things considered that he would fall in the "fair" category of a total joint replacement.⁷

⁵ Stechschulte Depo. at 15.

⁶ *Id.* at 23.

⁷ *Id.* at 35.

Claimant stated he does not currently take pain medication, either prescription or over-the-counter, on a daily basis. He indicated he does take Equate Pain P.M. on occasion, especially after an active day. Claimant testified increased activity, including prolonged sitting and walking, increases his bilateral knee pain. Claimant denied suffering any new accidents or injuries since May 5, 2003.

PRINCIPLES OF LAW

K.S.A. 44-501(c) (Furse 2000) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

K.S.A. 44-528 (Furse 2000) states:

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

(b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.

(c) The number of reviews under this section shall be limited pursuant to rules and regulations adopted by the director to avoid abuse.

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

ANALYSIS

1. What is the nature and extent of claimant's disability?

The ALJ found the impairment opinions of Drs. Stechschulte and Stuckmeyer to be equally credible. The ALJ's finding is supported by the record. The Board adopts the findings of the ALJ in this regard and finds claimant suffers a 43.5 percent functional impairment to each lower extremity at the level of the knee.

2. Did the ALJ err in the application of the credit for claimant's preexisting impairment?

The ALJ found respondent was not entitled to a credit for preexisting impairment arising from the 1997 injury. The Board agrees. In *Easter v. Stormont-Vail Health Care, Inc.*,⁸ the Court of Appeals wrote:

In *Hanson*,⁹ this court adopted a balancing test for the burden of proof in preexisting injury cases. Once the worker establishes an increased disability, the burden shifts to the employer to determine what amount of the injury was the result of a preexisting injury. [28 Kan.App.2d at 96.] The court held if the burden shifts to the employer and the employer fails to establish the extent of the preexisting injury, then the Board has no choice but to deduct zero from the total impairment rating. [28 Kan.App.2d at 96.]

The only evidence of impairment prior to the May 5, 2003, accident giving rise to this case is the November 18, 1999, settlement transcript, which notes a 15 percent permanent partial impairment to the right lower extremity. No medical reports were included with the settlement transcripts. The depositions of the physicians, whose opinions formed the basis of the 15 percent impairment, were not taken in this case. The Kansas Supreme Court wrote:

⁸ *Easter v. Stormont-Vail Health Care, Inc.*, No. 109,477 (Kansas Court of Appeals unpublished opinion filed Nov. 1, 2013).

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan.App.2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

Prior settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury.¹⁰

Functional impairment is defined as “the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.”¹¹ The Board has consistently held that the Workers Compensation Act requires preexisting functional impairment to be established by competent medical evidence.¹² The Board has stated “only the testimony given at the Settlement Hearing is admissible.”¹³ The Court of Appeals agreed with the Board’s interpretation of *Meza*: a medical opinion is required to support reduction in compensation for a preexisting condition being based upon a prior settlement.¹⁴

In this case, there is insufficient medical evidence to support reduction in compensation for a preexisting impairment prior to May 5, 2003. Respondent is entitled to a credit for compensation paid for the settlement of this case in the amount of \$14,500, based upon the running award entered on April 5, 2004, for a 16 percent permanent partial impairment to the left lower extremity and a 1.25 percent permanent partial impairment to the right lower extremity.

CONCLUSION

Claimant suffers a 43.5 percent functional impairment to each lower extremity at the level of the knee as the result of his work-related injuries. Respondent failed to meet the burden of proving entitlement to a credit for preexisting impairment prior to May 5, 2003. Respondent is entitled to a credit against permanent impairment in the amount of \$14,500.

¹⁰ *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 593, 738 P.2d 445 (1987).

¹¹ K.S.A. 44-510e.

¹² See *Kirker, Sr. v. Bob Bergkamp Construction Co., Inc.*, No. 1,050,186, 2011 WL 5341319 (Kan. WCAB Oct. 28, 2011); see also *Gibson v. Beachner Construction Co., Inc.*, No. 1,040,920 2010 WL 1445612, (Kan. WCAB Mar. 11, 2010).

¹³ *Meza v. National Beef Packing Co., LP*, No. 1,039,187, 2012 WL 4763656 (Kan. WCAB Sept. 14, 2012).

¹⁴ *Meza v. National Beef Packing Co., LP*, No. 108,768, 2013 WL 4404258 (Kansas Court of Appeals unpublished opinion filed Aug. 16, 2013).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review & Modification Award of Administrative Law Judge Kenneth J. Hursh dated October 23, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lisa R. McWilliams, Attorney for Claimant
lisa@kcinjurylaw.com

Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
jstephanie.warmund@libertymutual.com
kansascitylegal@libertymutual.com

Kenneth J. Hursh, Administrative Law Judge